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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

(Sacramento)

In re D. D., a Person Coming Under the
Juvenile Court Law..

C039347

SACRAMENTO COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

(Super.Ct.No. JD214840)

Plaintiff and Respondent,

v.

MOTHER OF D. D.,

Defendant and Appellant.

Appellant, the mother of the minor, appeals from the juvenile court's order terminating her parental rights. (Welf. & Inst. Code, §§ 366.26, 395; further undesignated statutory references are to the Welfare and Institutions Code.) Appellant asserts she was not provided proper notice of the hearing at which her rights were terminated. We agree.

FACTS AND PROCEDURAL HISTORY

The Sacramento County Department of Health and Human Services (DHHS) filed a dependency petition in February 2000

concerning the newborn minor, as well as his three half-siblings, after the minor was born with a positive toxicology screen for amphetamines. The minor's half-siblings are not subjects of this appeal. The petition alleged that appellant had a substance abuse problem that she had not been able to overcome. The petition was sustained and appellant was offered reunification services.

The social worker's 12-month review report indicated that appellant was pregnant and homeless. Appellant was terminated from counseling and drug treatment due to lack of attendance. She did not submit to drug testing as frequently as directed and tested positive for controlled substances on two occasions. She did not take advantage of transportation offered to facilitate visitation and did not visit the minor at his placement for several months. The report recommended termination of appellant's reunification services.

Appellant was present at the 12-month review hearing in March 2001. She had given birth to another child, S., who was before the court on the same date for a jurisdictional hearing. The juvenile court terminated reunification services in the minor's case and set a hearing to select and implement a permanent plan pursuant to section 366.26. The reporter's transcript of the proceedings reflects that the section 366.26 hearing was set for September 18, 2001, but the minute order indicates a date of July 18, 2001. A "non-appearance" hearing was set for May 2, 2001. The jurisdictional hearing concerning S. was continued to April 11, 2001.

Appellant did not appear at the hearing concerning S. on April 11, 2001. Appellant's attorney advised the juvenile court she had not had contact with appellant since the previous hearing. The juvenile court denied appellant reunification services in S.'s matter and set it for a section 366.26 hearing on August 7, 2001. The minor's case was also before the juvenile court on April 11 as an "uncalendared matter," and it was continued to April 13, 2001, to reset the minor's section 366.26 hearing.

Appellant was not present on April 13, 2001, and there is nothing in the record to indicate she was notified of the hearing. The juvenile court, acknowledging confusion as to the date for the minor's section 366.26 hearing, vacated all previously set dates and reset the hearing for August 7, 2001, the same date as S.'s section 366.26 hearing. A copy of the minute order reflecting the new date was mailed to appellant.

In May 2001, notice of the August 7 hearing date was served on appellant by substituted service and by certified mail. The notice served by certified mail indicated that both the minor and S. were scheduled for the hearing date in August.

At a "non-appearance" hearing on May 22, 2001, S.'s section 366.26 hearing was continued to September 4, 2001. Appellant was not present but was represented by counsel.

On July 5, 2001, a notice was sent to appellant indicating that the section 366.26 hearings for both S. *and the minor* were scheduled for September 14, 2001. It is not clear from the record why the section 366.26 hearing was noticed for and held

on September 14, 2001, when the juvenile court set S.'s hearing for September 4, 2001.

The social worker's report for the section 366.26 hearing indicated that appellant had failed to follow through on visitation after the case "was transferred to adoptions." The social worker reported that the minor's relative caretaker wished to adopt him and that the minor would likely be adopted, if parental rights were terminated. The report was signed on July 26, 2001. The record does not indicate that appellant received a copy of the report.

Appellant was not present in court on August 7, 2001. The juvenile court noted there had been "some duplicative noticing" of appellant and asked appellant's counsel whether counsel had been in contact with appellant. Appellant's counsel said she had spoken to appellant in May and June 2001, but was not certain whether she had provided appellant with the correct court date.

The juvenile court found that notice had been given as provided by law and terminated parental rights, ordering a permanent plan of adoption for the minor. Regarding notice, the juvenile court stated: "When one has multiple children in the dependency system and is at risk of at a minimum of having one or more of them go to guardianship let alone having parental rights terminated as to children, the fact that one might get duplicative notices with different dates does not mean that one had not been properly noticed. [¶] It simply means that one would, you might imagine, contact the attorney or come to court

to find out what is going on. The mother has absented herself from these proceedings. She has not been present in court for a significant period of time, and it really devolved upon the mother to show some responsibility to come into court for the dates upon which she had received notice -- rather about which she had received notice or to have further contact with her counsel or the social worker to clarify the dates that would concern her child."

The order from the August 7 hearing was signed by the juvenile court on September 10, 2001. The order was mailed to appellant on September 17, 2001.

On September 14, 2001, appellant was present for the section 366.26 hearing concerning S. On appellant's behalf, appellant's attorney objected to the termination of her parental rights and disputed information in the social worker's report regarding how often appellant had visited S. Appellant did not personally address the court at the hearing and appellant's attorney did not make any reference to the minor's case, which was not on calendar.

Appellant's attorney signed a notice of appeal on appellant's behalf in the minor's case on September 17, 2001.

DISCUSSION

Appellant contends she did not receive proper notice of the minor's section 366.26 hearing, because the multiple notices she received were misleading, thus depriving her of an opportunity to be heard.

"Since the interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic of civil rights [citations], the state, before depriving a parent of this interest, must afford him adequate notice and an opportunity to be heard." (*In re B. G.* (1974) 11 Cal.3d 679, 688-689.) "[D]ue process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [Citation.]" (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418.) "[N]otice must be of such nature as reasonably to convey the required information" (*Mullane v. Central Hanover B. & T. Co.* (1950) 339 U.S. 306, 314-315 [94 L.Ed 865, 873-874].) As stated by the United States Supreme Court in *Fuentes v. Shevin* (1972) 407 U.S. 67 [32 L.Ed.2d 556], "the central meaning of procedural due process [is] clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' [Citations.] It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" (*Id.* at p. 80 [32 L.Ed.2d at pp. 569-570].)

The last notice sent to appellant regarding the minor's section 366.26 hearing advised her, incorrectly, that September 14, 2001, was the date for the hearing. That appellant received and may well have relied on this notice is indicated by her appearance at the September 14, 2001 hearing.

The record is devoid of anything that would suggest that appellant was informed the minor's matter would still be heard on August 7, despite the erroneous notice. The juvenile court did not assure that appellant received notice in "'a meaningful manner'" when, aware that appellant had been provided with the wrong court date, it failed to take steps to correct the misinformation. (*Fuentes v. Shevin*, *supra*, 407 U.S. at p. 80.) Under these circumstances, we find that appellant was deprived of an opportunity to be heard.

Respondent contends, as did the juvenile court, that appellant was required either to attend every court date that had been noticed or to inquire of counsel, or the social worker, as to the correct date. While this may have been a reasonable course of action for appellant to take, she was not legally required to do so. It was incumbent upon the juvenile court, not appellant, to assure that any confusion, which may have been caused by the erroneous notice, was clarified. The juvenile court may not excuse errors in providing notice by shifting to a parent the court's obligation to give meaningful notice. Furthermore, here, there was no reason for appellant to be confused about the minor's hearing date. The hearing date had been changed previously, and appellant had been advised of such changes by mailed notices. It was reasonable for appellant to believe, based on the last notice she received, that the minor's hearing date had been changed again.

While the uncaring manner with which some parents approach dependency proceedings is frustrating, where a parent may have

been lulled into appearing on the wrong date by the court's own notice, we cannot excuse the court's failing by requiring the parent to confirm that the date they had been given by the court was the date they were, in fact, required to appear.

Respondent argues that, as appellant did not mention the minor's case at the September 14, 2001, hearing, it can be inferred that she was not confused about the correct court date. We find it equally plausible that appellant's attorney advised her prior to the hearing that the minor's case had gone forward on a previous date and was not before the court on September 14, 2001. The specific facts argued by the attorney concerning visitation at the September 14, 2001, hearing indicate she had spoken with appellant about the contents of the social worker's report. If appellant questioned her attorney about the minor's case, her attorney would have been correct to advise her that, as the juvenile court had already terminated her parental rights regarding the minor, her only remedy was to appeal the order. (§ 366.26, subd. (i).) This inference is bolstered by the fact that the September 14 hearing occurred on a Friday, and the notice of appeal in the minor's case was signed by appellant's attorney on the following Monday, September 17, before appellant could have received formal notice of the court's August 7 decision that had been mailed on the day the notice of appeal was filed. Thus, we will not draw the inference suggested by respondent from appellant's failure to "mention" the minor at a hearing concerning another child.

Respondent argues "any error as to notice of the date to which the hearing was continued was a violation of a statutory, not a constitutional right, and appellant must demonstrate prejudice to prevail on appeal." Contrary to respondent's contention, appellant does not claim a statutory notice violation; she asserts she was denied an opportunity to be heard, which is a violation of the right to due process of law.

Respondent argues that appellant was not denied her right to a hearing, because "[a] hearing was held, her prepared counsel was present and represented appellant, who chose not to attend." As discussed previously, the record does not support a finding that appellant "chose not to attend" the hearing. And although appellant's attorney was present at the hearing, she had not spoken to appellant since June, which was prior to the preparation of the social worker's section 366.26 report. Thus, appellant's attorney could not have been prepared for the hearing in any meaningful way.

Respondent urges us to find that any error in providing notice was harmless, because there was substantial evidence the minor was adoptable and no exception to adoption applied. We decline this invitation. Appellant was not present at the hearing due to lack of proper notice. Her attorney did not have the opportunity to confer with her about the contents of the social worker's report. "Prejudice occasioned by lack of notice, coupled with lack of advocacy, virtually leaps from the record." (*In re Anna M.* (1997) 54 Cal.App.4th 463, 469.) We will not speculate or assume that appellant, with counsel, would

have had nothing significant to contribute to a hearing to determine the permanent plan for the minor.

DISPOSITION

The order terminating appellant's parental rights is vacated and the matter is remanded for a new section 366.26 hearing after appellant is provided proper notice consistent with statutory requirements and due process.

HULL, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.